

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Part 90 of the)	
Commission's Rules To Provide)	PR Docket No. 89-552
for the Use of the 220-222 MHz)	RM-8506
Band by the Private Land Mobile)	
Radio Service)	
)	
Implementation of Sections 3(n))	GN Docket No. 93-252
and 332 of the Communications Act)	
)	
Regulatory Treatment of Mobile)	
Services)	
)	
Implementation of Section 309(j))	
of the Communications Act --)	PP Docket No. 93-253
Competitive Bidding, 220-222 MHz)	

To the Commission:

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COMMENTS OF MTEL TECHNOLOGIES, INC.

MTEL Technologies, Inc. ("Mtel")^{1/}, by its attorneys, hereby provides comments in response to the Commission's Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking ("Third Notice")^{2/} in the referenced proceeding. By these comments, Mtel addresses one critical component of the proposal set forth in the Third Notice: the possibility of licensing nationwide 220-222 MHz noncommercial systems via auction rather than via random selection from among longstanding applicants. As set forth below in more

^{1/} Mtel holds two of the 33 pending applications for nationwide noncommercial 220-222 MHz authorizations, one for a ten-channel system and the other for a five-channel system.

^{2/} Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, PR Docket No. 89-552 (RM-8506), GN Docket No. 93-252, PP Docket No. 93-253, 60 Fed. Reg. 45,566 (Sept. 7, 1995).

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detail, this option is both inequitable and inconsistent with the public interest. Therefore, it cannot legitimately be adopted.

I. INTRODUCTION

The Third Notice is remarkable in that it presents as an option the summary dismissal of nationwide noncommercial applications filed more than four years ago at the invitation of the Commission, without providing any meaningful discussion of the legitimacy of such option or how the option would serve the public interest.

The Commission's comments regarding the options for handling pending 220-222 MHz noncommercial nationwide licenses are cryptic. At one point, the Commission declares that it seeks "comment regarding whether to resolve pending mutually exclusive, noncommercial, nationwide applications by lottery, comparative hearing, or to return the applications and adopt a new licensing scheme for the 30 channels associated with the applications." Third Notice, at para. 12. Later, the Commission announces that it seeks comments on three possible ways to address these (pending) applications:

First, we could upon adoption of final rules in this proceeding, return these applications without prejudice, as well as the appropriate filing fees, to the 33 applicants, and proceed to auction nationwide licenses as discussed in Section c.3., infra. [Footnote omitted.] Second, we could act on the pending petitions for reconsideration of our June 21, 1993, Order, solicit the required amending information from the 33 applicants, and then conduct a lottery to award the four available nationwide licenses. [Footnote omitted.] The third option would be to grant authorizations

among the 33 applicants through comparative hearings. We seek comment on the advantages and disadvantages of each of these proposals. We note that the same statute granting the Commission discretion to determine the method that will be used to dispose of applications filed prior to its receipt of auction authority does not set forth factors which the Commission must consider when making such a determination. [Footnote omitted.]

Third Notice, at para. 30.

Mtel will not belabor the Commission with a discussion of whether it is appropriate to license via lottery or comparative hearing. This issue has already been fully ventilated and resolved in favor of lotteries.^{3/} Nothing has been introduced in the record or has otherwise transpired that would provide any additional support for the concept of licensing via comparative hearing, and Mtel submits that no additional consideration should be given to this matter. Accordingly, Mtel's comments will focus on the relative merits of licensing via auction and via lottery.

^{3/} See Memorandum Opinion and Order, PR Docket No. 89-552, 7 FCC Rcd 4484, 4489 (1992). See also Mtel's Reply Comments in that proceeding, where Mtel properly urged the Commission not to change its selection rules after applications had been filed. The Commission rejected the use of comparative hearings "because [it did] not believe that comparative criteria could be developed that would draw meaningful distinctions between competing applicants," and because comparative hearings would not be "likely to produce a result more enlightened or more in the public interest than would a lottery selection process." Id.

II. DISCUSSION

A. The Act Does Not Permit the Commission to License Noncommercial 220-222 MHz Nationwide Applications by Auction.

The Commission has invited comment on the advantages and disadvantages of each of its above proposals. The primary disadvantage of attempting to license pending applications by auction is that the Commission lacks authority to do so. Simply stated, the Budget Act^{4/} provides the Commission with authority to auction, only under certain circumstances, applications filed after July, 1993. But while the Budget Act provides the Commission with discretion to lottery applications prior to that date, nowhere does it grant the Commission discretion also to auction the licenses to which they relate.^{5/} Absent such discretion expressly provided by statute, the Commission is simply not

^{4/} Omnibus Budget Reconciliation Act of 1993 ("the Budget Act"), Section 6002(e).

^{5/} Indeed, review of the legislative history reflects that Congress' intent was not to change licensing processes associated with services such as 220-222 MHz nationwide noncommercial. Congress specifically recognized that

[I]nterruptions in the on-going filing, processing and approval of applications for licenses for existing services, which have not been characterized by rampant speculation, would be disruptive to business operations of existing wireless businesses and damaging to the economy.

H.R. Rep 103-111, H.R. Rep. No. 111, 103rd Cong., 1st Sess. 1993, 1993 U.S.C.C.A.N. 378, 1993 WL 181528 (Leg. Hist.), May 25, 1993. In the case of 220-222 MHz nationwide noncommercial applicants, both the small number of applications filed and the financial and other qualifications of the applicants themselves demonstrate that this is not a service where speculation is a legitimate concern.

empowered to auction those applications. Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).^{6/} For this reason alone, the Commission cannot properly dismiss the pending 220-222 MHz noncommercial nationwide applications and proceed to license by auction.^{7/}

B. Auctioning Nationwide Noncommercial 220-222 MHz Licenses Would Be Wholly Inconsistent with Auction Authority Granted in Section 309.

The Commission is only partially correct in its assertion that the Budget Act did not set forth factors which the Commission must consider when making a determination as to how to license when applications were filed before July, 1993. The simple reason that the Budget Act did not address this specific question is that, because it afforded the Commission no authority to auction such licenses, there was no reason to address this particular issue. Notwithstanding the above, the Budget Act did provide the Commission with clear direction as to when it could license by auction applications that were filed after the date of its enactment. Reference to that direction demonstrates that the 220-222 MHz

^{6/} There, the Supreme Court held that an administrative agency does not have "the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Id., at 208. Neither the Budget Act nor its legislative history provides such express authority.

^{7/} The Commission cannot sidestep the issue of retroactivity simply by dismissing pending applications and conducting an auction that would involve only newly-filed applications. Clearly, the dismissal of pending applications would be merely the first step in the auction process. Therefore, dismissal would properly be viewed as part of a retroactive application of new law.

nationwide noncommercial authorizations for which applications have been filed cannot properly be licensed by auction.

Section 309(j)(1) of the Communications Act provides that auctions can be utilized only where use of the electromagnetic spectrum is as set forth in Section 309(j)(2). Section 309(j)(2) provides that auctions can be utilized only if (a) the principal use of the spectrum involves, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee provides services, and (b) a system of competitive bidding will promote the objectives described in Section 309(j)(3). Section 309(j)(3) sets forth the following objectives: (a) the development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays; (b) the promotion of economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of licenses; (c) the recovery for the public of a portion of the value of the spectrum made available for public use and avoidance of unjust enrichment; and (d) the efficient and intensive use of the electromagnetic spectrum. Unless the aforementioned objectives can be achieved, the Commission has no authority to auction spectrum, even when applications were filed after July, 1993.

The record simply does not support argument that any of the required objectives for auction would be "furthered" by auction more than by lottery. With respect to the first criterion, administrative and judicial delays are a virtual certainty in the event that the Commission elects to license by auction.^{8/} Moreover, the Commission's record with respect to auctions avoiding excessive concentration of licenses is less than sterling.^{9/} There is nothing to suggest that there would be less concentration were 220-222 MHz nationwide noncommercial licenses to be awarded by auction. Also, although auctions may well recover a portion of the value of spectrum, so, too, would lotteries (by virtue of the considerable monies paid as application fees), so there would be no furtherance of this goal by use of auctions. Finally, there is nothing to demonstrate that licensing by auction would further the efficient use of electromagnetic spectrum in the 220-222 MHz band. Thus, since competitive bidding will not promote the objectives set

^{8/} Not only should the Commission expect litigation to be instigated by the pending 220-222 MHz applicants who would be denied their right to vie for the authorizations for which they have already applied, but based upon recent judicial decisions affecting the Band C proposed auctions, it appears as though considerable additional litigation will likely be initiated, focusing on whatever auction rules are eventually adopted. See, e.g., Telephone Electronics Corp. v. FCC, No. 95-1015 (D.C. Cir. March 15, 1995) (order granting stay); Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995), where various Commission policies relating to Band C auctions have been stayed or effectively overruled.

^{9/} The record reflects that, in the Commission's recent broadband auction, approximately 70 percent of the authorizations at issue were awarded to only four parties.

forth in Section 309(j)(3), the Commission has no authority to auction this spectrum.^{10/}

C. The Commission Is Obligated to Apply Its Rules Consistently.

As demonstrated above, the Commission lacks the legislative authority to license nationwide 220-222 MHz noncommercial spectrum via auction. But even holding this aside, licensing by auction would be improper in that it would constitute impermissibly disparate treatment of similarly-situated applicants.

Since enactment of the Budget Act, the Commission has been faced with the issue of how properly to process mutually exclusive applications filed before July, 1993. In both instances, the Commission properly determined that those licenses should be awarded by lottery. See, e.g., Memorandum Opinion and Order, Cellular Unserved Areas, 9 FCC Rcd 7383 (1994); Report and Order, Amendment of Parts 21 and 74 ... in the Multipoint Distribution Service (MDS), ___ FCC Rcd ___, 60 Fed.Reg. 36524 (July 17, 1995). Moreover, all other 220-222 MHz licenses awarded to date were the products of lotteries. Under such circumstances, it would be wholly inconsistent for the Commission now to license nationwide noncommercial 220-222 MHz frequencies via auction.

^{10/} It also imperative that the Commission keep in mind the expressed prohibition included in Section 309(j)(7) of the Communications Act against the Commission assigning bands of frequencies and in designing rules governing the licensing of applications. The Commission is prohibited from basing any findings of public interest, convenience, and necessity on the expectation of federal revenues from the use of a system of competitive bidding.

As Judge Mikva eloquently explained in addressing inconsistent Commission action in similar proceedings:

[A] sometimes-yes, sometimes-no, sometimes-maybe policy ... cannot ... be squared with our obligation to preclude arbitrary and capricious management of [an agency's] mandate.

Green County Mobilephone, Inc. v. FCC, 765 F.2d 235, 237 (D.C. Cir. 1989), citing NLRB v. Washington Star Co., 732 F.2d 974, 977 (D.C. Cir. 1984). See also Melody Music, Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965), where Chief Judge Bazelon chastised the Commission for treating two similarly-situated applicants completely differently, especially when both "were considered by the Commission at virtually the same time," and where he warned the Commission that "[W]hatever action the Commission takes on remand, it must explain its reasons ... [and] the relevance of those differences to the purposes of the Communications Act." Id., at 733. Here, the disparate treatment that would be associated with auctions cannot be explained, were the Commission to license by auction.

D. Licensing By Auction Would Be Wholly Inequitable.

The 33 pending nationwide noncommercial 220-222 MHz applications were filed more than four years ago. Each application was accompanied by a check in the amount of \$12,500.00, which was cashed by the Commission long ago. Each applicant also incurred not-inconsiderable expense associated with preparation of the application. With the benefit of hindsight, it appears as though the applicants may have made prudent investments based upon the value

of the authorizations and the number of applications submitted, although any detailed analysis must address the economic costs of the applicants' foregoing other potential investment.

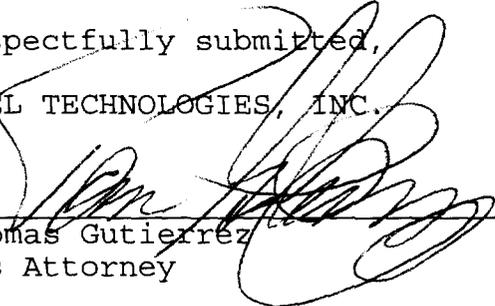
Under such circumstances, applicants cannot be made whole merely by return of filing fees. Rather, equity dictates that the Commission abide by its contract with pending applicants and process their applications through lottery. To do otherwise would not only be unfair to the pending applicants, but it would serve to undermine public confidence in the U.S. government.

III. CONCLUSION

There is only one appropriate way to license the noncommercial nationwide authorizations for which applications were filed well over four years ago: use lotteries. It is the only equitable strategy and, the only one that is legally permissible. No further consideration should be given to the use of either auctions or comparative hearings for the licensing of nationwide 220-222 MHz noncommercial systems.

Respectfully submitted,

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September 27, 1995

CERTIFICATE OF SERVICE

I, Catherine M. Seymour, a secretary in the law firm of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 27th day of September, 1995, have had hand delivered copies of the foregoing "COMMENTS OF MTEL TECHNOLOGIES, INC." to the following:

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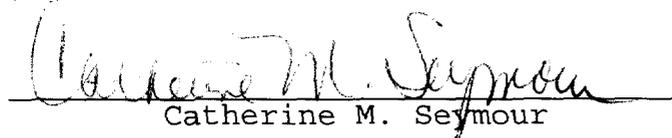
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